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No. 90-530

In The

# Supreme Court of the United States

October Term, 1990

ROUND TABLE PIZZA, INC., ET AL.,

*Petitioners,*

v.

WILLIAM R. LARSON,

*Respondent*

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Only one paragraph of Larson's Opposition addresses the main issue raised for this Court's review: whether, by conducting an independent and painstaking review of the record to reverse the trial court's factual finding that Larson sought recision of the ESOP, the Court of Appeals both misapplied the abuse of discretion standard and departed from the accepted and usual course of judicial proceedings.

Instead of responding to this asserted error, Larson rewrites the Court of Appeals' holding, and then attempts to justify the result of the revised opinion. At best, Larson's transparent revision of the Court of Appeals' decision is misguided; at worst, it is a blatant attempt to obfuscate the issues properly presented in Round Table's Petition.

The Court of Appeals' reversal was based on its finding that the factual predicates of the trial court's decision had no support in the record. The panel stated that the issue of whether Larson satisfied the adequacy of representation requirement under Rule 23.1 essentially turned on a single issue: "whether, as found by the trial court, [Larson] sought to rescind" the ESOP.[1] After conducting a "painstaking study of the trial court record," the panel incorrectly found that Larson was not seeking recision of the ESOP.[2] Thus, because it believed "the major factual predicate of the trial court's decision finds

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[1] Appendix I at A-7.

[2] Id.; see also Appendix I at A-21-23.

no support in the record," the Court of Appeals reversed.[3/] By conducting an independent and painstaking review of the record to reverse a factual determination, the Court of Appeals misapplied the abuse of discretion standard and deviated from the accepted and usual course of judicial proceedings.[4/] Round Table's Petition requests that this Court grant certiorari to correct the Court of Appeals' errors.

Larson's Opposition, however, virtually ignores the Court of Appeals' express rationale and the arguments raised in Round Table's Petition. Instead, Larson argues that the panel reversed to correct the trial court's flawed conclusion of law. Larson claims that the Court of Appeals reversed the trial court based on its holding that a

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[3/] Id. (emphasis added.)

[4/] Larson asserts that the panel did not err by making an independent factual determination based on its painstaking review of the trial court record. Opposition at 25, n.16. Larson is wrong: it is error for a Court of Appeals to make such an inquiry. See, e.g., Pullman-Standard v. Saint, 456 U.S. 273 (1982) (Court of Appeals' independent review of record, and subsequent substitution of its factual finding for District Court's, was error).

single shareholder can bring a derivative suit under Rule 23.1. This ground alone, asserts Larson, was "an adequate basis for reversing the district court's judgment."[5] Thus, concludes Larson, "the Court of Appeals reached the correct result on sound reasoning and there is no reason for this Court to intervene."[6]

Larson's interpretation of the Court of Appeals' decision, however, is simply wrong. There was no conflict between the trial court and the panel on the "single shareholder issue." As the Court of Appeals noted, "the district court acknowledged [that a single shareholder may bring a derivative suit] in its September 8 order."[7] Thus, there was no error of law for the Court of Appeals to correct. In fact, the panel agreed that, if Larson were seeking to rescind the ESOP, there was "a strong argument that [Larson] could not qualify as an

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[5] Opposition at 12-16.

[6] Opposition at 16.

[7] Appendix I at A-24-25. The District Court's September 8 Order is reprinted as Appendix III.

adequate representative because he was 'economically antagonistic' toward the corporation and the other shareholders."[8/]

Contrary to Larson's suggestion, the disagreement between the Court of Appeals and the District Court was over facts, not law. The abuse of discretion standard of review requires that the Court of Appeal accept the District Court's findings of fact if there is any evidence on which it rationally could have made that decision.[9/] Here, however, the Court of Appeals ignored the abuse of discretion standard by conducting an independent review of the facts to determine that Larson was an adequate representative, despite the abundant evidence in the record supporting the trial court's findings.[10/] It is the Court of

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[8/] Appendix I at A-7.

[9/] See, e.g., Petition of Hill, 775 F.2d 1037, 1040 (9th Cir. 1985); see also Round Table's Petition at 30-35.

[10/] Appendix I at A-21. Those facts were Larson's desire to rescind the ESOP, his lack of support from minority shareholders and his personal interest in securing a higher price for his shares.

Appeals' incorrect and inappropriate independent inquiry into the trial court's factual determinations that provide the basis for Round Table's Petition.

Only a single paragraph buried on pages 21 and 22 of Larson's Opposition addresses the central issue.[11] In that paragraph, Larson merely summarizes the evidence listed by the Court of Appeals' in its discussion and asserts that the panel "could properly conclude" that both Larson's and his trial counsel's admissions that they were seeking rescission of the ESOP were "irrelevant because rescission had never been properly sought in the first place."[12] As discussed at length in Round Table's Petition, the Court of Appeals' decision was both demonstrably wrong[13] and an abuse of discretion.[14]

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[11] Incredibly, despite the panel's statement that its decision "essentially turn[ed] on whether, as found by the trial court, [Larson] sought to rescind" the ESOP, only one paragraph of Larson's 26 page brief discusses this issue.

[12] Opposition at 22.

[13] Petition at 21-27.

[14] Petition at 30-36.

Larson's summary assertion that the District Court's conclusion was "clearly erroneous" is meritless.

The inability (or unwillingness) of Larson to respond to the issues presented in Round Table's Petition without grossly distorting the Court of Appeals' decision illustrates the need for plenary review. Although virtually ignored in Larson's Opposition, this case turns on a central factual issue: whether Larson sought to rescind the ESOP. The District Court found that he did. In reversing this factual finding, the Court of Appeals not only impermissibly substituted its discretion for the District Court's, but also made an obvious and dispositive error. These are the issues properly raised in Round

Table's Petition. For the reasons expressed in the Petition, certiorari should be granted.

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Respectfully submitted,

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